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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 1299-1300

SOUTHERN TRANSPORTATION COMPANY, as owner of the Barge "CUTLER",

Libellant-Appellee,

against

M/V "JULIUS H. BARNES", ERIE & ST. LAWRENCE CORPORATION,

Claimant-Appellant,

and

Tug "CALATCO No. 2" and CANAL LAKES TOWING CORPORATION,

Claimants-Respondents-Impleaded-Appellees.

ERIE & ST. LAWRENCE CORPORATION, Owner of the M/V "JULIUS H. BARNES",

Libellant-Appellant,

against

Tug "CALATCO No. 2" and CANAL LAKES TOWING CORPORATION,

Respondents-Appellees.

Brief for Canal Lakes Towing Corporation, Claimant of the Tug "Calatco No. 2" in Opposition to Petition for Writ of Certiorari

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Towing Corporation.

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Canal Lakes Towing Corporation, claimant of the tug 'CALATCO No. 2" in both of the above-entitled actions, and ppellee in the proceedings in the Circuit Court of Appeals, respectfully submits that the petition for a writ of ertiorari should be denied for the following reasons:

1. The matter involves only the question whether the District Court and the Circuit Court of Appeals rightly held the petitioner's motor vessel "JULIUS H. BARNES" jointly at fault with the "CALATCO No. 2" on the ground that the "BARNES":

"(a) Continued to travel at a high rate of speed toward the tow (CALATCO No. 2) and barge, although the tug had not answered the first one-blast signal of the "BARNES";

(b) In that the "BARNES" blew no signal to inform the tug (CALATCO No. 2) that the "BARNES" did not understand the intention or course of the tug;

(c) In that the master of the "BARNES" when he realized that there was danger of collision, did not immediately reverse his engines and blow a danger signal;

(d) In that the speeding "BARNES" unnecessarily crowded the slow-moving tow in attempting to pass on the port side of the tug (CALATCO No. 2), although there was plenty of water in which the more maneuverable "BARNES" could have set her course to pass the tow at a greater distance off."

(The above quotation is taken from the Findings and Conclusions of the District Court, Record, fol. 965.)

2. The decision of the Circuit Court of Appeals is not in conflict with the decision of any Circuit Court of Appeals rendered subsequent to this Court's decision in *Postal Steamship Corporation* v. *El Isleo,* 308 U. S. 378, 60 S. Ct. 332, 84 L. Ed. 335 (Jan., 1940), wherein this Court delineated the duties of a privileged vessel in a crossing situation after danger of collision had become apparent, and remanded the case for further decision, or subsequent to the decision of the Circuit Court of Appeals for the Second Circuit in the same case (reported *sub nom Postal S.S. Corp.* v. *Southern Pac. Co.,* 112 F. (2nd)

297, June, 1940), wherein the Circuit Court following this Court's decision, held the privileged vessel jointly at fault with the burdened vessel for failing to stop when danger of collision was apparent. Neither the petition nor the supporting brief cites any case decided by a Circuit Court of Appeals subsequent to the *El Isleo* decisions, *supra*.

3. This Court said in the *El Isleo* (*supra*):

> "The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action. Her right to maintain her privilege ends when there is danger of collision and in the presence of that danger both vessels must be 'stopped and backed if necessary, until signals for passing with safety are made and understood' " (387).

Thus it follows that the question petitioner now presents has been settled by this Court and the decisions sought to be reviewed are not in conflict with applicable decisions of this or other Courts and do not depart from the accepted and usual course of judicial proceedings.

4. That there is unanimity of thought among various Circuit Courts of Appeals since this Court's decision in the *El Isleo* (*supra*) is demonstrated by the fact that the Circuit Court of Appeals which decided the case included a Circuit Judge from each of the Fifth and Seventh Circuits.

5. The numerous references in petitioner's papers to the Rules of the Road at Sea established by International Convention are inappropriate. The vessels involved in this collision were navigating in Upper New York Bay, between Staten Island and the Battery of Manhattan, in inland waters. Their navigation, therefore, was governed by the inland rules of navigation and not by the Rules of the Road at Sea established by International Convention.

6. In its opinion, the District Court said (Record, fol. 942):

> "The obligation on the privileged vessel in a crossing situation to keep her course and speed does not apply when to do so 'is likely to result in disaster'. The 'Senator Rice' (C. C. A. 2nd Cir.), 223 Fed. 524. 'Over and underlying all the rules of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision. That one vessel is obviously at fault does not justify another in running down her or her tow; a navigator may see how wrong another is, yet he must still avoid collision, if he reasonably can.' The 'George S. Tice' (C. C. A. 2nd Cir.) 287 Fed. 127. 'It must always be remembered that it is the risk of collision, not the collision itself, that masters must avoid.' Ocean S.S. Co. v. United States, 38 F. (2d) 782. The privileged vessel may not hold her course and speed after it becomes evident that the burdened vessel either cannot or will not keep out of the way. The 'Fulton,' 54 F. (2d) 467. This second circuit in Postal S.S. Corp. v. Southern Pac. Co., 112 F. (2d) 297, in referring to the privilege of the holding on vessel when faced with a cross-signal from the giving way vessel, stated: 'the interest of the holding-on vessel in holding her course and speed is nil; she is called upon to surrender nothing of substance, compared with the overshadowing interest of avoiding collision, or danger of collision,' and the court held that even though the other vessel was far more gravely at fault the court could not apportion damages—that the damages would be divided."

Affirming the decision, the Circuit Court of Appeals said in part (Record, fol. 1025):

> "We are unable to agree with libellant that the decision incorrectly adjudged the facts or is in conflict with any applicable legal principle. It will serve no useful purpose for us to do again what the district judge has already done so well, retell the story of the collision, trace and point out wherein its actors were at fault. It is sufficient for us to say that we

approve what the district judge did, and the way he did it, and that on his opinion and for the reasons that he gave, we affirm his decrees."

The decision of this Court in the *El Isleo* (*supra*) makes it clear that the decisions in this case are correct.

The petition should be denied.

Respectfully submitted,

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Attorney for Canal Lakes
Towing Corporation.

JAMES A. MARTIN,
CHRISTOPHER E. HECKMAN,
Counsel.